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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-389

JAMES STRONG, ET AL., *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Claims

PETITIONERS' REPLY TO MEMORANDUM IN OPPOSITION

RODNEY J. EDWARDS
800 First American National Bank Building
Duluth, Minnesota 55802
Attorney for Wyandot and Chippewa petitioners

JAMES R. FITZHARRIS
700 Lake Shore Drive
Escanaba, Michigan 49829
Attorney for Chippewa, Ottawa and Shawnee petitioners

ALLAN HULL
6505 Wilson Mills Road
Mayfield Village, Ohio 44143
Attorney for Ottawa petitioners

JACK JOSEPH
69 West Washington Street
Chicago, Illinois 60602
Attorney for Shawnee and Peoria (Piankeshaw/Wea) petitioners

PAUL G. REILLY
Suite 1000, The Watergate 600
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
Attorney for Six Nations petitioners

LOUIS L. ROCHMES
9800 Ashburton Lane
Bethesda, Maryland 20034
Attorney for Delaware petitioners

EDWIN A. ROTHSCHILD
8000 Sears Tower
Chicago, Illinois 60606
Attorney for Miami petitioners

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The memorandum of the United States in opposition begs the questions at issue.

A.

Respondent makes certain arguments and assertions of fact not germane to the central issue, which is "exclusiveness" of possession as a criterion of aboriginal

Indian title. The assertion that there were no permanent settlements in the areas to which the claims of title were denied (Memorandum 2) is immaterial, since permanent settlements are not a requirement of aboriginal title (*Spokane Tribe* v. *United States,* 163 C. Cls. 58, 66) as well as mistaken, since the Commission's findings show permanent settlements in such areas similar to those in the "exclusive" areas, except for their mixed tribal occupancy (see Findings 9, 10, Pet. App. B, pp. 56a-64a). The contention that the claimants' use and occupancy were of too short duration (Memorandum 4) was overruled by the Commission and was not raised by the Government on its appeal from the holdings favorable to the Delaware and Shawnee tribes. The contention that the lands were abandoned (ibid.) was rejected by both the Commission and the Court of Claims.

B.

The contention that the test of Indian title recited by the Court below, (actual, "exclusive" and continuous use and occupancy) "has been consistently used and approved" (Memorandum 4) evades the issue, since what is here involved is a unique application of the doctrine of "exclusiveness". In none of the cases cited was there any question of aboriginal title claimed by two or more tribes using or occupying land together.

The cited decisions of the Court of Claims, all involving claims under the Indian Claims Commission Act, routinely recited the same aboriginal title formula, but had no occasion to test its application to a case like this one. The present decision of the same court

is not a logical extension of a previously developed rule, but a new and unprecedented holding.

The Supreme Court decisions cited are all consistent with the view that two or more friendly tribes may hold aboriginal title together, to the exclusion of others, and the principles underlying the decisions support such a view. *Santa Fe* was cited and quoted in the petition (at p. 12). On the authority of *Santa Fe, Northwestern Shoshone* contains a similar dictum on aboriginal title: ". . . the right because of immemorial occupancy to roam certain territory to the exclusion of other Indians and in contradistinction to the custom of the early nomads to roam at will in search of food" (324 U.S. 335, 339). As in *Santa Fe* the contrast is drawn, not between one tribe and more than one, but between stable land use and nomadic wandering. The case turned on the question whether the title was recognized by treaty, not on the criteria for aboriginal title. A dissent on the treaty interpretation question, by Mr. Justice Douglas, author of the *Santa Fe* opinion, summarizes aboriginal title without reference to exclusiveness: "Indian title is the right to occupancy based upon aboriginal possession" and the dissent goes on to quote from *Mitchell* v. *United States* the principle that "the right of occupancy is considered as sacred as the fee simple of the whites" (324 U.S. at 359). There is no suggestion that, unlike whites, Indian tribes may not be co-owners.

Johnson v. *McIntosh* and *Worcester* v. *Georgia,* cited by respondents, are the classic statements by Chief Justice John Marshall on the political relations between the United States and its Indian tribes. The tribes "were admitted to be the rightful occupants of

the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion" (*Johnson* v. *McIntosh,* 8 Wheat. 543, 574). There is nothing in the opinion which implies that the claim is defeated when the Indians' discretion led to shared use. The principles of these decisions strongly suggest the contrary.

C.

Respondent United States errs in describing the Vincennes tract issue as simply a question of treaty interpretation (Memorandum 5-6). It is not disputed that the treaty of Fort Wayne defined the boundaries of the Vincennes tract reserved to the United States under the Greeneville treaty. But, since the boundaries so defined erroneously encompassed more land than the United States was entitled to under the Greeneville treaty, with no payment therefor to the tribes who thus lost their rights of possession, the question is whether the agreement of the tribes to the erroneous boundaries is a valid reason for denying them compensation.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for certiorari should be granted.

Respectfully submitted,

RODNEY J. EDWARDS
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Duluth, Minnesota 55802
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JAMES R. FITZHARRIS
700 Lake Shore Drive
Escanaba, Michigan 49829
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